Is Certiorari Contingent on Litigant Behavior? Petitioners’ Role in Strategic Auditing

Maxwell Mak, Andrew H. Sidman, and Udi Sommer*

Complementing the burgeoning literature on agenda setting on the Supreme Court of the United States, this article addresses a key question heretofore overlooked—Is the justices’ choice to review a decision independent of the selection of cases for review by the litigants? We argue that the certiorari process cannot be modeled as an independent one; rather, it is inextricably linked with and essentially contingent on the behavior of litigants who bring the case to the Supreme Court. This dependence of the Court is important both at the level of theory and at the empirical level and ignoring it entails bias in the estimation process. Using an original database, which includes the universe of religion free exercise cases decided at the courts of appeals from 1968–2006, we find significant selection effects. Factors that influence decisions on certiorari are dependent on the behavior of petitioners and should be modeled as such.

I. Introduction

The interaction between the U.S. courts of appeals, the Supreme Court, and litigants goes far beyond the approximately 80 cases decided on the merits each term by the high court. In establishing legal precedent and inducing compliance by lower courts, the Supreme Court faces the same difficulties that are faced by any principal at the top of a hierarchy. Despite a very low probability of sanctions in the form of high court review and possible reversal, research examining decision making at the courts of appeals (e.g., Brent 2003; Songer & Haire 1992; Songer & Sheehan 1990) generally concludes that lower court compliance with the Supreme Court is the norm rather than the exception. Cameron et al. (2000) offer a potential explanation, suggesting that higher courts are strategic in their selection of cases. The cases they review are the ones that would induce the maximum amount of compliance by lower courts. Although it is considered a primary function within the federal judiciary, the certiorari stage at the Supreme Court, however, goes beyond simple error correction of the lower courts. Deciding which cases to decide serves as an

*Address correspondence to Udi Sommer, Assistant Professor, Department of Political Science, Tel Aviv University, Ramat Aviv, Tel Aviv 69978, Israel; email: udi.sommer@gmail.com. Mak is Assistant Professor, John Jay College of Criminal Justice, CUNY; Sidman is Assistant Professor, John Jay College of Criminal Justice, CUNY.

The authors are grateful for the invaluable research assistance of Christopher Morabito and Kevin Mulligan. They are also thankful for the insightful and helpful comments of the editors and reviewers.
opportunity for the justices to pursue their policy preferences. Choosing the correct vehicles would allow them to make decisions with long-lasting and potentially significant influence on all levels of government.

Previous research on the Supreme Court’s certiorari process is plentiful (e.g., Brenner 1979; Caldeira & Wright 1989; Caldeira et al. 1999; McGuire & Caldeira 1993) and confirms that the choices justices make are systematic; however, none of these examinations have seen the certiorari process as being conditional or reliant on the actions of litigants and their decision to seek high court review. Although some scholars have recognized the key role of litigants (Priest & Klein 1984; Eisenberg & Farber 2003), most empirical examinations of the decision to decide assume independence between the decision (of litigants) to petition and the decision (of justices) to review. Given the institutional setup of the federal judiciary, as well as countless accounts of the behavior of appealing litigants, we argue that this is a serious omission of a critical theoretical concept in the examination of the certiorari stage. As will be explained in detail below, examinations of the certiorari stage are incomplete without accounting for the behavior of litigants, and its relations to the decision to audit a case. Particularly, we show that the decision to grant is not independent as has been previously assumed; rather, it is conditional on the choices litigants make in deciding to petition for review.

We test our proposition regarding the contingent nature of the petition and review process with data for the universe of free exercise cases decided at the U.S. courts of appeals from 1968 to 2006. Our theoretical approach and, therefore, the empirical specification link two aspects of the federal judiciary that have been assumed to be and were previously modeled as independent. We demonstrate that failing to account for the conditional nature of the decision on certiorari not only leads to an incomplete theorization of the Court’s gate-keeping stage, it is also a fundamental empirical flaw; estimates of the predictors of certiorari are otherwise biased, rendering inference problematic. Thus, the examination offered here is a significant step in a more complete and accurate understanding of the petition and review process.

II. THE CONDITIONAL NATURE OF THE PETITION AND REVIEW PROCESS

Justices engage in strategic and systematic behavior when deciding which cases to decide (Perry 1991; Boucher & Segal 1995; Zorn et al. 1999; Sommer 2010, 2011). Indeed, the Supreme Court induces compliance by strategically selecting cases for review, with ideology playing a key role (Cameron et al. 2000). Cameron et al. (2000) advance the strategic auditing hypothesis—based on observable case factors and circumstances, the Court will be less likely to grant review when an ideologically proximate lower court hands down an ideologically favorable (similar) decision; where the lower court is ideologically distant, the Court will be more likely to review overall, but in comparison, less likely to grant certiorari if the lower court rules in the ideological direction that the Supreme Court prefers.

Case selection is a significant way in which the legal system influences society, and the decisions of litigants to take the case to court are a crucial nexus in this context (Priest &
Klein 1984; Yates & Coggins 2009). Indeed, the characteristics of litigants are key to the analysis of judicial decision making, including in the case-selection stage (Eisenberg & Farber 2003). Yet, compared to our understanding of judicial decision making, we know surprisingly little about the decision making of those bringing cases from the courts of appeals to the highest court of the land. Likewise, we know equally little about whether and in what ways the high court’s agenda setting is systematically influenced by the prior decisions of those (frequently only potential) petitioners.

The Supreme Court is reliant on losing litigants. While the justices may have control over their docket, the control, by institutional design, extends to only those cases that are first appealed. In other words, the Court simply cannot review any cases terminated or decided at the lower courts without a losing litigant seeking recourse at the nation’s highest court. Thus, the decisional calculus regarding the certiorari process should and must be a function of the decision to appeal.

Since cases terminated at the courts of appeals far outnumber cases the Supreme Court audits, for practical reasons the Supreme Court has no means of its own to exercise effective oversight over the multitude of cases handled by the circuit courts. As such, the behavior of litigants in the judicial hierarchy is a crucial link. If there is a possible deviation from Supreme Court jurisprudence or precedent, litigants should recognize such a review opportunity and be willing to incur the costs to petition for a writ of certiorari, alerting the justices of a possible defiance. Indeed, this strategic behavior is necessary for the federal judiciary to adequately function (Songer et al. 1995); a failure on the part of litigants to systematically appeal and thus signal lower court error or defiance would deprive the Supreme Court of this critical tool necessary for its position as an effective principal.

There is a plethora of considerations for losing litigants in their decisions to petition for high court review. The most obvious, of course, is appealing an instant case to the Supreme Court to remedy lower court defiance. The decision to appeal may also be influenced by factors beyond the instant case, speaking to broader legal and constitutional questions (e.g., Baird 2007); losing litigants may function as legal entrepreneurs, using particular cases as steps in advancing particular legal agendas. In addition, litigants also appeal to their constituencies (especially if it is a membership interest group bringing the case to the Supreme Court (Hansford 2004)) or try to attract public attention to a certain topic when they ask the Court for a writ of certiorari.

There is evidence to suggest that, given the costliness of applying for a writ of certiorari, litigants are strategic in their decisions to petition (e.g., Songer et al. 1994, 1995; Zorn 2002). That is, litigants will generally refrain from filing frivolous appeals with the

---

1To be certain, this is not just a problem the Supreme Court has with lower federal courts. The president and Congress face similar problems in their oversight of federal agencies. These actors, especially Congress, rely on “fire alarms” to inform them when agencies act outside of congressional preferences (McCubbins & Schwartz 1984). Under this type of oversight, congressional committees that are not, nor could they become, fully knowledgeable regarding the actions of the agencies within their jurisdiction both “patrol” agencies—actively seek information regarding agency behavior—and wait for extra-governmental actors like interest groups to inform them about agency behavior. Using interest groups in this way can be an extremely efficient means of conducting oversight. There are far more interest groups than congressional committees and these groups are often organized around one or a small set of issues. Thus, interest groups provide a cost-effective solution to information asymmetries between Congress and the bureaucracy.
Supreme Court; rather, they systematically aim to maximize utility—they petition when they expect to reap the most benefit and incur minimum cost. Thus, they will request review where there is a good reason to expect that they will achieve their goals, for instance, that review will be granted and the lower court decision reversed. As ideology is thought to play a role in Court decision making, it should also be important to the decisions of litigants (Priest & Klein 1984). Cases petitioned exhibit a higher degree of ideological voting versus cases not appealed (Songer et al. 1994, 1995). Litigants appear more likely to petition decisions that exhibit a higher degree of ideological voting by judges. Insofar as ideology is important to the Court’s decisions (Segal & Spaeth 1993, 2002), it enters as a strategic consideration for potential petitioners.

In sum, justices’ decisions to review are contingent on the cases brought before them (Baird 2004, 2007). Hence, decisions at the litigation stage are interlinked with how justices set the Court’s agenda. Accordingly, this article complements the separate examinations of petitioning (Solowiej & Collins 2009; Solberg & Waltenburg 2006; Hansford 2004; Martinek 2006) and of agenda setting on the Supreme Court (Perry 1991; Zorn et al. 1999) with whether and how the choice of cases for plenary review is contingent on petitioners’ behavior.

III. SELECTION EFFECTS AND COURT DECISION MAKING

Selection bias refers to the estimation of biased and inconsistent coefficients in models where the dependent variable is unobserved for a subset of the sample (Heckman 1979). In the current context, we wish to examine the factors that contribute to the decision to grant certiorari to review the decisions of courts of appeals. The selection problem arises because the sample for which we can analyze certiorari decisions is nonrandom. Even further, there is a systematic process that determines selection into the certiorari sample. If the factors we wish to include in models of certiorari (the outcome process) also determine whether losing litigants petition for certiorari (the selection process), not accounting for the selection process can lead to biased estimates of factors in the outcome process.

As a concrete example, consider the effects of ideological distance between the lower court and Supreme Court on certiorari decisions. Theories of strategic auditing tell us that the Supreme Court should be more likely to review decisions rendered by lower courts that are more ideologically distant. We present a probit model that does not account for sample selection with the decision to grant certiorari as the dependent variable in the results section of this article; this model is included to compare its results with those from a sample selection probit model. In the model that does not account for sample selection, ideologi-

---

2Zorn (2002) concludes that in deciding to appeal, federal litigants are strategic, using similar criteria to those used by justices when determining whether a case is cert-worthy; specifically, the federal government considers the costs of appeal, reviewability of the decision, and the likelihood of success on the merits before appealing to the Supreme Court.

3We expand on this point in the data and methods section of the article.
cal distance is not significant. We, therefore, would be unable to conclude that ideological
distance affects decisions on certiorari for free exercise cases. Assume that litigants also
believe that ideologically distant lower courts are more likely to be reviewed; losing litigants
would therefore be more likely to petition for certiorari when the deciding appellate panel
is more distant from the Supreme Court. With little variance in the predictor in the
(relatively limited) sample of cases granted certiorari, the estimation procedure indicates
that ideology is inconsequential in the agenda-setting process. Accounting for the selection
effect, however, one finds that ideological distance does significantly affect decisions on
certiorari. Furthermore, the same rationale applies to other factors influencing petition
and review.

IV. DATA AND METHODS

We test the selection bias hypothesis using original data collected for the universe of cases
of free exercise of religion decided at the U.S. courts of appeals from 1968 to 2006. Like
previous work on certiorari, we restrict our examination to cases appealed from the federal
courts of appeals (e.g., Benesh 2002; Songer et al. 1994).\footnote{This may limit to some extent the
generalizability of our conclusions to cases emanating from the several states. Yet, the
dynamic between the Supreme Court and the courts of appeals provides a sufficiently
important examination of the hierarchy of the justice system (Songer et al. 1994).} There are several reasons for selecting the religion free exercise cases. First, we
selected this issue area for its importance to the federal judiciary. In general, the likelihood
of lower court compliance is lower in cases concerning civil liberties and rights (Baum
1978). Thus, it is vital that litigants behave strategically and assist the Supreme Court in its
oversight of the circuit courts. Moreover, examining this issue area offers a jurisprudentially
rich area of law; there is arguably a long lineage of significant Supreme Court jurisprudence
in this area. A key benefit is a “controlled experiment” in the form of significant alteration
of free exercise precedent by the Supreme Court during the time period examined here. As
such, we are able to determine whether litigants significantly altered their behavior in
accordance with high court decisions.\footnote{Furthermore, as jurisprudence at both the Supreme Court and circuit courts may continue to grow, studying this area
of the law has important policy implications. At the circuit courts, cases concerning collisions with government and
religion free exercise rights have and will continue to appear. In the first six years of our sample, the circuit courts
cumulatively decided an average of about eight cases each year; the circuit courts terminated on average about 20
cases per year during the last six years of the sample and we see no reason to expect this trend to change.}

Earlier we referenced a controlled experiment in the context of free exercise cases. This
is the change in the adjudication of these claims during the time period examined
here. The Supreme Court shifted jurisprudence with its decision in Employment Division,
Department of Human Resources of Oregon v. Smith (1990). The majority opinion rejected the

\footnote{When using the first search term “Free Exercise w/5 religio!” employed in this examination (detailed below), a quick,
informal search on Lexis/Nexis yielded 822 potential cases emanating from state high courts during the time period
studied. No other search term (again, detailed below) produces more than 390 cases.}
compelling interest, strict scrutiny standard established in Sherbert v. Verner (1963) and its subsequent 30 years of progeny and changed the level of judicial scrutiny to be applied when determining the constitutionality of government actions. The Smith decision adopted a test of constitutionality resembling the rational basis test, which would support individual liberties the least. Hence, under Smith it would be easier for laws that inhibit the right to freely exercise one’s religion to pass muster. Losing litigants in the post-Smith era should be mindful that a majority of the justices have become less sympathetic to free exercise claims.6 More specifically, if litigants are strategic, they should realize that appealing a conservative lower court decision would more likely result in a denial of certiorari.7 This change in the decisional calculus of litigants should in turn influence the way the Supreme Court considers certiorari.

Original data were collected for all free exercise cases decided at the U.S. courts of appeals from 1968 to 2006. Identification of the population of cases was completed through searches on Lexis/Nexis,8 which includes information for some (but not all) case opinions that were unpublished.9 To be included in the population of cases employed in this research, cases had to pertain to the constitutionality of regulations or provisions that seek to limit and restrict religious rights under the free exercise clause of the First Amendment.10 Cases that were cross-petitioned were counted as separate cases if the petitions challenged different provisions or aspects of a government regulation seeking to restrict the right. Moreover, cases containing multiple docket numbers were also counted as separate cases if the circuit court opinion made note of the controversies as being different for each docket number, indicated different provisions for each, or they arose from different states within

---

6This general conclusion should hold true regardless of congressional statutes (i.e., the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000) that attempted to restore the compelling interest test.

7Even if certiorari were granted, the chances of a high court decision supportive of free exercise rights would be de minimis at best.

8This method does place much discretion in the researcher in identifying the relevant population of cases; however, the selection process proceeded quite cautiously to ensure that as many relevant cases were included in the examination as possible. The coding strategy was as follows. First, searches on Lexis/Nexis were completed employing search terms similar to those utilized in Brent (1999, 2003). For the entire period, they were “Free Exercise w/5 religio!,” “compelling w/5 interest w/10 religio!,” “wisconsin w/10 yoder,” “Free Exercise clause,” “strict scrutiny w/25 religio!,” and “sherbert w/10 verner”; for cases after 1989, the search terms were “employment division w/10 smith,” “religious freedom restoration act,” “RFRA,” and “Boerne.” Second, each case was then screened to ensure that it involved a controversy surrounding a government regulation or action that restricts the free exercise of religion.

9As Songer (1988) cautions, the use of Shepard’s Citations only elicits those cases that include full citations or case names in the opinion. Lexis/Nexis is the appropriate source for case selection. While it occasionally suffers from problems of search overinclusion as well as underinclusion, it does offer information on published cases and some information for unpublished cases, alleviating some concerns as to the potential bias from including only published decisions.

10Cases where the controversy began with such a regulation, but the overall question answered by the court focused on standing, justiciability, or jurisdiction were also included. If one is to accept the possibility of opinions being post hoc justifications for ideological voting, omission of such litigation and the subsequent decisions would be problematic and bias the results.
the circuit. In total, the sample of cases analyzed here includes 578 appellate decisions and 169 petitions for certiorari.

To examine the factors that are thought to influence the decisions of litigants, the factors that influence the certiorari decisions of justices, and, most importantly, the extent to which there is a systematic relationship between the two decisions, we employ a variation of Heckman's (1979) selection bias framework. The dependent variables in both the selection and outcome equations are dichotomous. We therefore estimate the sample selection probit model described by Van de Ven and Van Pragg (1981), which allows for a dichotomous outcome variable. The model’s two equations are presented as follows:

Selection: \( P(\text{Petition} = 1) = f(\text{Ideological Factors, Contextual Factors, Free Exercise Case Facts}) \)

Outcome: \( P(\text{Grant} = 1) = f(\text{Ideological Factors, Contextual Factors, Petitioner Status}) \)

In the selection equation, \( \text{Petition} \) is coded 1 if a given case was petitioned by a litigant for a writ of certiorari, 0 otherwise. The likelihood of petitioning is modeled as a function of three sets of independent variables: ideological factors, contextual factors, and free exercise case facts. In the outcome equation, \( \text{Grant} \) is coded 1 if the Supreme Court granted certiorari, 0 otherwise. The likelihood of certiorari being granted is modeled as a function of ideological factors, contextual factors, and petitioner status. Model diagnostics suggested that the free exercise case facts did not need to be included in the grant equation and petitioner status did not need to be included in the petition equations.\(^{11}\) Summary statistics are presented for both dependent variables and all the independent variables in Table 1; independent variables are further described in the following subsections. Maximum likelihood estimation of the model also estimates the arctangent transformation of \( \rho \), the correlation between the error terms of the two equations. The significance of the arctangent of \( \rho \) represents the first test of our hypothesis. We provide two additional tests: whether \( \rho \) itself is significantly different from zero and a comparison of the estimates from the grant equation against estimates from a probit model for granting certiorari that does not account for sample selection.

A. Ideological Factors

Turning to the substantive variables, previous research has highlighted important factors that influence certiorari decisions by the Supreme Court. Our theory suggests that some of these indicia not only affect the outcome of whether a case is granted review, but also serve as significant elements in the decisional calculus that litigants employ in petitioning for review. In other words, factors that influence the granting of certiorari are also used by litigants when deciding whether to appeal. As such, we include several of these factors in both the petition and grant equations.

\(^{11}\) Wald tests were used to test the joint significance of free exercise case facts in the grant equation and petitioner status in the petition equation. With respect to case facts, the case fact dummy variables were included in both equations. None of the case fact variables were significant in the grant equation. The test for joint significance produced a \( \chi^2 \) equal to 9.90 with a \( p \) value of 0.194. Turning to petitioner status, we estimated a sample selection probit model with the status dummy variables in the petition equation. Similarly, none of the variables were significant and the test of joint significance produced a \( \chi^2 \) equal to 3.22 with a \( p \) value of 0.522.
Most notably, the strategic auditing hypothesis as posited by Cameron et al. (2000) suggests that ideological distance between the panel and the Court, the ideology of the circuit court panel, and the decision rendered work systematically and synergistically on the likelihood an appeal will be granted certiorari. Controlling for the observable case factors and circumstances, the Supreme Court should be more likely to review decisions from lower courts that are ideologically distant from itself, especially if the lower court renders a decision that is ideologically disparate from the Court’s ideology. Litigators should also be more likely to petition for certiorari under these same conditions.
To derive a measure of the ideological position of the Supreme Court relative to the circuit courts, we employ the Giles et al. (2001) coding strategy. A given judge’s ideology takes on the value of the nominating president’s common space score (Poole 1998) if senatorial courtesy is inactive. If senatorial courtesy is in play, a given judge’s ideology takes on the value of the home-state senator of the president’s party; if both home-state senators share the same party affiliation as the nominating president, the judge’s ideology is measured as the average of the senators’ common space scores. To measure Supreme Court ideology, we employ the Epstein et al. (2007) judicial common space (JCS) scores, which convert the Martin-Quinn ideological scores (Martin & Quinn 2002) for Supreme Court justices into common space scores (Poole 1998) and allow us to place judges and justices on the same ideological scale. To capture ideological distance, we took the absolute difference between the panel’s median judge and the Supreme Court’s median justice.

**Liberal panel** is a dummy variable coded 1 if the panel’s median judge common space score was less than zero, which is the theoretical moderate point in common space. **Liberal decision** is a dummy variable coded 1 if the panel decision supported the free exercise claimant, 0 otherwise. Given the conservative leanings of the Court during the time period examined, liberal outcomes overall should be more likely to be petitioned for review. Moreover, liberal outcomes should be petitioned more often as ideological distance increases. Lastly, decisions favoring free exercise rights should have the highest propensity of being petitioned when made by an ideologically distant liberal panel, ceteris paribus. Thus, all variables from the strategic auditing hypothesis are interacted with each other.

### B. Contextual Factors

Beyond ideological factors, we include several variables that are expected to affect the likelihoods of petition and review. The literature has highlighted several cues that justices may pay attention to when deciding the cert-worthiness of a case (Tanenhaus et al. 1963; Teger & Kosinski 1980; Ulmer 1983). According to our theory, knowing that these indicia serve as potential review signals should make litigants more likely to petition when they are present. **Dissenting opinion** indicates the presence of a dissenting opinion in the lower court. Dissenting opinions could highlight a controversy within the case or issue area or, particularly, deviation from Supreme Court precedent or preferences (Tanenhaus et al. 1963; Ulmer 1983; Cross & Tiller 1998; Hettinger et al. 2006). We therefore expect the presence of a dissenting opinion to function as a fire alarm and thus increase the likelihood of both petitioning and review.

Many have noted the importance of amicus curiae briefs to judicial decision making (e.g., Caldeira & Wright 1988; Cross & Tiller 1998; Collins 2008). Whether their presence indicates the salience of a case, whether they correlate with other cues like dissenting

---

12Please note that favoring the free exercise claimant is but one way of coding liberal decision. There is the possibility that support for the free exercise claimant may be viewed as a conservative decision, depending on the positions taken by the litigants and additional value conflicts that may be present. Like other areas of constitutional interpretation, decisions may benefit wide ranges of litigants. We therefore define a liberal decision as one that supports individuals over the government.
opinions, or whether the Court directly considers the groups or individuals responsible for filing these briefs, there is general agreement that amicus curiae briefs positively affect the likelihood of review. Amicus participation should, therefore, also increase the likelihood of petitioning. Amicus participation is included in the petition equation through a dummy variable, \textit{amicus curiae (appeals)} coded 1 if at least one amicus brief was filed at the circuit court case, 0 otherwise. We include a different dummy variable in the grant equation, \textit{amicus curiae (cert)}, which takes on a value of 1 if an amicus brief was filed with the Supreme Court. We expect any amicus participation to increase the likelihood of petitioning and review; previous research has described amicus participation as signaling the salience of a case and increasing its likelihood of review regardless of whether briefs support or oppose the petition (Caldeira & Wright 1988).

\textbf{Litigator experience} is measured here with a dummy variable coded 1 if an attorney appeared at least twice before the Court to argue free exercise cases from 1943 to 2006, 0 otherwise. While there are possible alternative measures of litigator experience, we chose this coding strategy for several reasons. First, this measure employs the same coding strategy as the measure used in another examination of the value of experienced attorneys in the certiorari process (McGuire & Caldeira 1993). This measurement strategy assumes that litigators representing litigants multiple times in a given substantive issue area are more likely to be experts in that area. Second, and more importantly, this coding strategy alleviates potential coder bias in determining which litigators are actually experts in the field of free exercise. Having an experienced litigator on an appeal should increase the credibility of the petition and therefore increase the likelihood the Court would grant certiorari. As for the influence on petitioning, we are agnostic as to the influence of an experienced litigator, given the fact that the decision to appeal is not the sole responsibility of litigators, but a function of the wishes of those the litigators represent.

We include two additional variables in the petition equation. First, the publication of circuit court opinions is thought to be an indicator of case salience (Zorn 2002). Unpublished decisions have little to no value as precedent; publication of the opinion, therefore, signals the importance of a given case. An \textit{unpublished decision}, which is measured as a dummy variable, should be less likely to be petitioned to the Court. Second, \textit{post-Smith} is a dummy variable coded 1 for cases decided after the Supreme Court’s decision in \textit{Smith}. Following our previous discussion of the relevance of \textit{Smith}, losing litigants should be less likely to petition for certiorari after this decision.

\section*{C. Free Exercise Case Facts}

To examine the potential influence of variation in the laws being challenged, we included several additional variables to control for case facts that are indicative of free exercise challenges (Weinshall-Margel 2011). \textit{Dietary restriction} is a dummy variable coded 1 if

\footnote{Given that the grant equation includes a much smaller subset of cases (29 percent of the original universe), \textit{unpublished decision} and \textit{post-Smith} could not be included there. This is primarily due to a lack of variability in the outcome subset. These variables do, however, indirectly affect the decision to grant certiorari through their effects on the likelihood of petitioning.}
the restriction on free exercise of religion concerned a limitation on diet, 0 otherwise. Sabbath observation is coded 1 if the restriction concerned a limitation on the free exercise claimant’s ability to observe the Sabbath, 0 otherwise. Monetary benefits is coded 1 if the restriction denied the free exercise claimant some monetary benefit, 0 otherwise; for example, this variable includes the denials of unemployment benefits and tax exemptions. Right to pray is a dummy variable coded 1 if the restriction denied the free exercise claimant’s ability to pray, 0 otherwise; these restrictions generally centered on the denial of religious services or accommodations related to religious services. Offense to religious sensibilities is a dichotomous variable coded 1 if the restrictions offended the free exercise claimant’s religious sensibilities, 0 otherwise; this includes forced religious indoctrination or participation. National security is a variable coded 1 if the restriction on free exercise was justified by national security, 0 otherwise; examples include conscientious objection to military service or free exercise practices of military personnel or at military installations. Criminal conviction is a dummy variable coded 1 if the restriction on free exercise rights carried a criminal conviction; this includes drug possession for religious practices or contempt charges for failing to take an oath.14 Practice restrictions was coded 1 if the limitations concerned restrictions on material goods necessary for practice; this includes denial of religious materials or grooming policies. Alleged discrimination is coded 1 if the free exercise claimant alleged discrimination between religious groups or between sectarian and nonsectarian groups, 0 otherwise; this also includes claims of retaliatory behavior based on religion or, in some instances, demonstrating secular beliefs.

Please note that these variables are included only in the selection equation, which is the decision to petition the Supreme Court for review and potential reversal. At the certiorari stage, we find no significant influence of any of the religious free exercise case facts described in this section on the justices’ decisions to grant certiorari.15

D. Petitioner Status

We also control for the status of the petitioner, given the fact that the status of the litigant has been shown to be a significant influence on the choices justices make (e.g., Sheehan

---

14In addition to its potential effects as an independent variable, we recognize that, generally, behavior in criminal cases can be systematically different than behavior in civil cases. The small number of criminal cases in our data limit the extent to which we can address this question statistically. We did, however, estimate the petition and certiorari stages of the model independently on subsamples of the data defined by the presence of a criminal conviction. We then compared the estimates between criminal and noncriminal cases, criminal and the full data, and noncriminal and the full data using Hausman tests. The test statistics that follow suggest no systematic differences in estimates between these subsamples or in comparison with the full data.

15These case facts are also listed with summary statistics in Table 1.
et al. 1992). Thus, we included several variables to account for this influence. **GROUP** is a dummy variable coded 1 if the petitioner was a group entity, 0 otherwise. A petitioner was considered a group if it was a nonindividually named entity such as business, church, or corporation; moreover, where there were multiple separately named and docketed individuals, we counted those as groups as well. **LOCAL GOVERNMENT** is a dichotomous variable coded 1 if the petitioner was a local government entity below the state level, which included municipalities and counties, and 0 otherwise. **STATE GOVERNMENT** is coded 1 if the petitioner was a state-level entity, 0 otherwise. **FEDERAL GOVERNMENT** is coded 1 if the petitioner was a federal government entity, 0 otherwise.\(^{17}\)

We are generally agnostic with regard to these control variables, but we do believe that the likelihood of a case being granted rises as the level of government rises. Particularly, there is ample evidence suggesting that the Supreme Court is generally deferential to the federal government (McGuire 1998; Segal 1988, 1990; Sheehan et al. 1992; Songer & Sheehan 1992; Ulmer 1985). As a result, the justices should be most receptive to the Solicitor General, when the latter is petitioning for a writ of certiorari.

**E. A Caveat and a Note Regarding Conflict**

As an additional note, we also wanted to include a variable indicating whether there was an alleged and/or an actual conflict between circuit court decisions. Studies have indicated that potential or actual conflict significantly increase the likelihood of Supreme Court review (Sturley 1989). Given the Court’s role as head of the federal judiciary, we do not doubt that intercircuit conflict serves as an important determinant of the decision to decide. Yet, there are several reasons for its omission. First, the primary source for actual and litigant-alleged conflict is the Epstein et al. (2007) archive for cert-pool memos from the personal papers of Justice Blackmun. Unfortunately, the data currently cover only eight terms at the Supreme Court, which would significantly shrink the sample size. Specifically, the model would have only 128 observations for the petition model and an even more anemic 26 petitions in the certiorari model. An alternative would be to use Lexis/Nexis, but it does not provide the actual petitions for the writ of certiorari for all cases that are denied review. Consequently, we were unable to code whether a petitioning litigant alleged

\(^{16}\)As previously explained, indicators of petitioner status are included only in the grant equation; these variables were not significant in the petition equation. Similarly, we do not include any variables for respondent status seeing as these indicators were not significant in either equation, controlling for petitioner status. Summarizing our discussions of litigant status and foreshadowing the results presented in Table 2, we find that it is petitioner status that specifically matters and particularly with respect to decisions to grant certiorari.

\(^{17}\)There is evidence that resources matter and, at both state and federal courts, greater resources can indeed translate into greater degrees of litigant success (e.g., Farole 1999; Galanter 1974; Songer et al. 1993; Wheeler et al. 1987). The amount of resources of these litigants may also be driving determinants of the decisions to appeal. Assuming that the decision to appeal is costly both in time and money, litigants with more ample resources may be more willing to incur the costs than those with less resources. As noted above, we estimated models including dummy variables for whether the potential petitioner was a group, a local government entity, a state government entity, or a federal government entity. The intuition is that increasing resources should increase the likelihood of petitioning the Supreme Court, all else equal. We do not find evidence suggesting that increasing resources significantly alters the probability that a litigant may seek high court review.
potential conflict between circuits and inclusion of an intercircuit “conflict” variable proved unworkable.

V. RESULTS AND DISCUSSION

Results for the sample selection probit model are presented in Table 2. We find strong support for the hypothesis that decisions to grant certiorari are not independent of decisions to petition in the context of free exercise cases. As explained in the data and methods section of this article, we provide three tests of this hypothesis. First, the estimate for the arctangent of $r$, $-15.513$, is highly significant and infers a strong negative relationship between the error terms of the equations. This does not suggest a negative relationship between petitioning and granting; as we demonstrate with the control variables in a subsequent paragraph, factors that increase the likelihood of petitioning also indirectly increase the likelihood of certiorari. The significance of the arctangent of $r$ does, however, support the hypothesis of dependence between the equations. Second, the Wald test of independent equations tests the null hypothesis that $r$ equals zero. The estimated arctangent corresponds to a value of $r$ that is approaching $-1$ and is significantly different from $0$. The $\chi^2$ of $36.22$ is significant beyond the 0.0001 level.

On the subject of model performance, we acknowledge here that a quick reading of Tables 1 and 2 shows that the petition equation, according to the percent correctly predicted, performs only slightly better than a naïve model and, by the same statistic, the grant equation provides no gains in prediction as compared to the modal category. Part of this is due to the nature of our sample, which is in fact the population of religious free exercise cases decided by federal courts of appeals between 1968 and 2006. Petitioning for certiorari is an infrequent event, representing 29.2 percent of the sample; granting certiorari occurs even less frequently—certiorari is granted in 13.6 percent of the cases that are actually petitioned. The predictions of this model are therefore being compared to sizable modal categories. Despite the marginal-to-nonexistent gains in prediction, the sample selection model provides significant insight into the processes of petitioning for and granting certiorari in religious free exercise cases. We see this in the significant coefficients in the two equations and in the presence of bias in the grant equation when sample selection is not accounted for, to which the discussion now returns.

We include one final test for the existence of selection bias in models of certiorari. We estimated the grant equation presented in Table 2 via probit without accounting for sample selection. These estimates are presented in Table 3 adjacent to the grant equation estimates from the sample selection probit. Looking at the two coefficient columns, one can see that both the estimates and the significance levels are different when not accounting for sample selection. We also provide a Hausman-like statistical test for the equality of the coefficients across the two models.\[18\] The results are presented at the bottom of Table 3.

\[18\]The assumptions of the Hausman test were not met; we therefore combined the results of the probit and sample selection probit models using seemingly unrelated estimation. The $\chi^2$ that we report is a Wald test of the equality of coefficients between the probit model and the grant equation from the sample selection probit.
Table 2: Results of the Sample Selection Probit Model

<table>
<thead>
<tr>
<th>Variable</th>
<th>Petition Equation (Selection)</th>
<th>Grant Equation (Outcome)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberal decision</td>
<td>0.102</td>
<td>0.243</td>
</tr>
<tr>
<td>Liberal appellate panel</td>
<td>0.194</td>
<td>0.135</td>
</tr>
<tr>
<td>× Liberal decision</td>
<td>-0.178</td>
<td>0.302</td>
</tr>
<tr>
<td>Ideological distance</td>
<td>1.451***</td>
<td>0.309</td>
</tr>
<tr>
<td>× Liberal decision</td>
<td>-0.833</td>
<td>0.997</td>
</tr>
<tr>
<td>× Liberal panel</td>
<td>-0.837*</td>
<td>0.487</td>
</tr>
<tr>
<td>× Liberal decision × Liberal panel</td>
<td>-0.653</td>
<td>1.224</td>
</tr>
<tr>
<td>Dissenting opinion</td>
<td>0.327***</td>
<td>0.125</td>
</tr>
<tr>
<td>Amicus curiae (appellate)</td>
<td>-0.261**</td>
<td>0.110</td>
</tr>
<tr>
<td>Amicus curiae (cert)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Experienced litigator</td>
<td>-0.020</td>
<td>0.112</td>
</tr>
<tr>
<td>Unpublished decision</td>
<td>-0.426**</td>
<td>0.178</td>
</tr>
<tr>
<td>Post-Smith</td>
<td>-0.367***</td>
<td>0.105</td>
</tr>
<tr>
<td>Dietary restriction</td>
<td>-0.408</td>
<td>0.274</td>
</tr>
<tr>
<td>Sabbath observation</td>
<td>-0.069</td>
<td>0.392</td>
</tr>
<tr>
<td>Monetary benefits</td>
<td>-0.031</td>
<td>0.123</td>
</tr>
<tr>
<td>Right to pray</td>
<td>-0.573***</td>
<td>0.175</td>
</tr>
<tr>
<td>Criminal conviction</td>
<td>-0.076</td>
<td>0.161</td>
</tr>
<tr>
<td>Practice restrictions</td>
<td>-0.181</td>
<td>0.106</td>
</tr>
<tr>
<td>Offense of religious sensibilities</td>
<td>-0.134</td>
<td>0.126</td>
</tr>
<tr>
<td>Alleged discrimination</td>
<td>-0.151</td>
<td>0.141</td>
</tr>
<tr>
<td>Military</td>
<td>0.063</td>
<td>0.105</td>
</tr>
<tr>
<td>Group</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local government</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State government</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal government</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intercept</td>
<td>-0.473***</td>
<td>0.124</td>
</tr>
<tr>
<td>Observations</td>
<td>578 (Appellate Decisions)</td>
<td>169 (Petitions for Certiorari)</td>
</tr>
<tr>
<td>% correctly predicted</td>
<td>71.8%</td>
<td>86.4%</td>
</tr>
<tr>
<td>Log pseudo-likelihood</td>
<td>-367.229</td>
<td></td>
</tr>
<tr>
<td>Arctangent of ρ</td>
<td>-15.513***</td>
<td></td>
</tr>
<tr>
<td>Wald test of ind. equations; χ²(1)</td>
<td>36.22***</td>
<td></td>
</tr>
</tbody>
</table>

*p < 0.1; **p < 0.05; ***p < 0.01 (two-tailed).

Note: Results are from the estimation of a sample selection probit model in which selection is modeled as a function of ideological factors, contextual factors, and case facts; the outcome is modeled as a function of ideological factors, contextual factors, and litigant status. The selection variable, PETITION, is coded 1 if the losing litigant petitioned for certiorari, 0 otherwise. The outcome variable, GRANT, is coded 1 if certiorari was granted, 0 otherwise. As explained in the text, we provide two test statistics in this table supporting the use of the selection bias framework: an estimate for the arctangent of ρ and the Wald test of independent equations. Significance of both implies a systematic relationship between decisions to petition for and decisions to grant certiorari. Standard errors are robust. Data for this table are original data collected for the universe of cases of free exercise of religion decided at the U.S. courts of appeals from 1968-2006.

labeled as “Test of Coef. Equality.” The estimated χ² equals 204.46 and is significant well beyond the 1 percent level, which provides additional support for the dependence hypothesis. In sum, Table 3 further emphasizes that not accounting for selection effects results in biased estimates in certiorari models, at least in the area of religious free exercise.
Table 3: Comparison of Probit and Sample Selection Probit Models

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberal decision</td>
<td>-0.898</td>
<td>0.834</td>
<td>-0.583</td>
<td>0.420</td>
</tr>
<tr>
<td>Liberal appellate panel</td>
<td>-0.605</td>
<td>0.575</td>
<td>-0.376***</td>
<td>0.039</td>
</tr>
<tr>
<td>x Liberal decision</td>
<td>0.978</td>
<td>1.036</td>
<td>0.695*</td>
<td>0.405</td>
</tr>
<tr>
<td>Ideological distance</td>
<td>-1.007</td>
<td>1.415</td>
<td>-1.332***</td>
<td>0.006</td>
</tr>
<tr>
<td>x Liberal decision</td>
<td>3.583</td>
<td>2.850</td>
<td>2.332</td>
<td>1.470</td>
</tr>
<tr>
<td>x Liberal panel</td>
<td>2.607</td>
<td>1.799</td>
<td>1.558***</td>
<td>0.404</td>
</tr>
<tr>
<td>x Liberal decision x Liberal panel</td>
<td>-4.601</td>
<td>3.671</td>
<td>-1.594</td>
<td>1.837</td>
</tr>
<tr>
<td>Dissenting opinion</td>
<td>0.331</td>
<td>0.314</td>
<td>-0.072</td>
<td>0.152</td>
</tr>
<tr>
<td>Amicus curiae (appellate)</td>
<td>0.462</td>
<td>0.328</td>
<td>0.037</td>
<td>0.107</td>
</tr>
<tr>
<td>Amicus curiae (cert)</td>
<td>1.425***</td>
<td>0.471</td>
<td>0.688***</td>
<td>0.240</td>
</tr>
<tr>
<td>Experienced litigator</td>
<td>-0.312</td>
<td>0.297</td>
<td>-0.108</td>
<td>0.146</td>
</tr>
<tr>
<td>Group</td>
<td>-0.308</td>
<td>0.288</td>
<td>-0.134</td>
<td>0.107</td>
</tr>
<tr>
<td>Local government</td>
<td>0.624</td>
<td>0.503</td>
<td>0.262</td>
<td>0.312</td>
</tr>
<tr>
<td>State government</td>
<td>0.978***</td>
<td>0.457</td>
<td>0.555**</td>
<td>0.263</td>
</tr>
<tr>
<td>Federal government</td>
<td>1.031*</td>
<td>0.589</td>
<td>0.630**</td>
<td>0.331</td>
</tr>
<tr>
<td>Intercept</td>
<td>-1.302***</td>
<td>0.435</td>
<td>0.605***</td>
<td>0.001</td>
</tr>
<tr>
<td>Number of petitions</td>
<td>169</td>
<td></td>
<td>169</td>
<td></td>
</tr>
<tr>
<td>% correctly predicted</td>
<td>87.0%</td>
<td></td>
<td>86.4%</td>
<td></td>
</tr>
<tr>
<td>Log likelihood</td>
<td>-55.650</td>
<td></td>
<td>-367.229</td>
<td></td>
</tr>
<tr>
<td>Test of coef. equality: ( \chi^2 ) (16)</td>
<td>204.46***</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* \( p < 0.1 \); ** \( p < 0.05 \); *** \( p < 0.01 \) (two-tailed).

Note: The dependent variable in both models is whether the Supreme Court granted certiorari. The probit results are generated from a model that does not account for sample selection. The sample selection results are the same as presented for the grant equation in Table 2. We also include the test of coefficient equality, which is a Wald test for the equality of coefficients across the two models. The significant test statistic implies that the estimates of the sample selection probit are significantly different from probit estimates that do not account for sample selection. Standard errors are robust. Data for this table are original data collected for the universe of cases of free exercise of religion decided at the U.S. courts of appeals from 1968-2006.

...to model the likelihood of petitioning would prevent one from concluding that ideological factors affect certiorari decisions, at least in free exercise cases, and the only factors that matter are amicus participation and whether the petitioner is a state government or the federal government. Ignoring the selection stage would also lead researchers to miss a number of indirect effects that we present in Figure 1.

In addition to demonstrating selection effects in certiorari decisions, Table 2 also shows strategic behavior on the part of litigants and the Supreme Court. Looking first at the ideological tenor of the courts, ideological disparities between the appeals courts and the Supreme Court significantly figure into the decisions of litigants and justices. Figure 1 plots the effects of ideological distance on petitioning and review. As explained in the note to Figure 1, interactions including both ideological distance and the direction of the decision are not significant; predicted probabilities were therefore generated for conservative appellate decisions, which are coded 0, to prevent adding the insignificant interactive coefficients. Figure 1 presents two sets of probabilities. Black curves represent the predicted probability of petitioning; gray curves represent the predicted probability of granting...
Figure 1: The effects of ideological distance on decisions to petition and decisions to grant.

Note: Predicted probabilities are derived from the coefficient estimates presented in Table 2. Predicted probabilities were generated across the range of ideological distance holding all control variables at 0, which is the median value of all control variables. Two sets of curves are presented: one set representing the predicted probability of petitioning for certiorari (black curves) and the other set representing the predicted probability of granting certiorari (gray curves). Predicted probabilities are presented for conservative appellate panels (solid curves) and liberal appellate panels (dashed curves). All presented predicted probabilities assume a conservative appellate decision. None of the interactions including both ideological distance and liberal decision are significant. Predicted probabilities were therefore generated with liberal decision coded 0 so as to not add the insignificant interactive coefficients. Data for this figure are original data collected for the universe of cases of free exercise of religion decided at the U.S. courts of appeals from 1968–2006.

certiorari. Solid curves represent conservative appellate panels; dashed curves represent liberal appellate panels.

Across the range of ideological distance, the likelihood of petitioning markedly increases. When distance is minimized, suggesting an appellate panel highly proximate to the Supreme Court median, the probability of petitioning is 0.318 if the appellate panel was conservative and 0.39 if the panel was liberal. As ideological distance increases, the probability of petitioning steadily climbs to 0.711 for conservative panels and 0.562 for liberal panels, respective increases of 0.393 and 0.172 across the range of ideological

19This and all subsequent predicted probabilities are generated holding all variables, except the variable or variables of interest, at their median values.
distance. While slight differences exist in the probability of petitioning between conservative and liberal panels, the general result is clear; increasing ideological distance between the appellate panel and the Supreme Court is an important consideration with respect to the petitioning behavior of litigants. Further, the results suggest that potential petitioners are strategic in their behavior. This strategic calculation appears to pay off at least some of the time. Increasing ideological distance does increase the likelihood that the Supreme Court will grant review, but only when the appellate panel is liberal. As noted earlier, the Supreme Court is generally conservative during the time period analyzed here, encompassing the Burger and Rehnquist eras of the Court. The Court during this era, at least for free exercise cases, appears to place more emphasis on auditing liberal appellate panels that are ideologically distant. Recall that ideological distance is measured as an absolute value; thus ideologically distant conservative panels are likely more conservative than the Supreme Court. The Court appears to see little reason, ceteris paribus, to keep a watchful eye on conservative appellate panels. Although Figure 1 does display a decrease in the probability of granting review for a conservative panel as distance increases, the overall decrease in predicted probabilities is small in magnitude. Thus, the Court rarely grants review where a conservative panel has rendered a decision. For liberal panels, increasing ideological distance from its minimum to its maximum increases the likelihood of granting certiorari from near 0 to 0.38.

Beyond ideology, several other factors significantly affect the likelihoods of petitioning for and granting certiorari. In the petition equation, all the variables identified as significant in Table 2 have direct effects on the likelihood of petitioning. Likewise, the presence of amicus briefs at the certiorari stage and whether the petitioner is a state or the federal government directly affect the likelihood of granting certiorari. Unpublished decisions, appellate cases decided after Smith, and cases involving the right to pray, which have direct effects on the likelihood of petitioning and are not included in the grant equation, also have significant indirect effects on the likelihood of granting certiorari. This is also the case with the presence of a dissenting opinion and amicus participation in the appellate case. These two variables are included in the grant equation, but their coefficients are not significant. We do, however, observe significant changes in the predicted probability of certiorari being granted coming through their effects on petitioning. All these significant effects are presented in Figure 2, which presents the change in predicted probability caused by the presence of the variable of interest. Given that all the variables presented in Figure 2 are dummy variables, the change in probability is calculated for a change in the value of the independent variable from 0 to 1.

Petitioners and justices clearly pay attention to cues for the potential cert-worthiness of cases. The presence of a dissenting opinion increases the predicted probability of petitioning by 0.13 and the predicted probability of granting certiorari by 0.18. Consistent with the findings in prior work, petitioners and justices are heavily influenced by amici

These variables are: ideological distance, the interaction between ideological distance and liberal appellate panel, the presence of a dissenting opinion, whether at least one amicus curiae brief was filed, whether the decision is published, whether the appellate case was decided after Smith, and whether the law being challenged infringed on the free exercise claimant’s right to pray.
briefs. Their presence in the appellate case increases the probability of petitioning by 0.10 and granting by 0.22; amicus participation at the certiorari stage increases the probability of granting staggeringly by 0.57. As expected, losing litigants are less likely to petition the high court when the appellate decision is unpublished and after the Court’s decision in Smith. Each condition reduces the probability of petitioning by 0.17 and 0.15, respectively. Likewise, the probability of granting certiorari drops by 0.31 for unpublished decisions and by 0.27 in the post-Smith era. With respect to case facts, right to pray cases were the only type to significantly affect petitioning. For right to pray cases, the probability of petitioning decreases by 0.23 and the probability of granting certiorari decreases by 0.41. For cases involving practice restrictions, the probability of granting certiorari decreases by 0.12.

Figure 2: The effects of significant control variables on decisions to petition and decisions to grant.

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Predicted Probability (Δ)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petition Equation</td>
<td></td>
</tr>
<tr>
<td>Dissent</td>
<td>0.13</td>
</tr>
<tr>
<td>Amicus (Appellate)</td>
<td>0.10</td>
</tr>
<tr>
<td>Unpublished</td>
<td>-0.17</td>
</tr>
<tr>
<td>Post-Smith</td>
<td>-0.15</td>
</tr>
<tr>
<td>Right to Pray</td>
<td>-0.23</td>
</tr>
<tr>
<td>Grant Equation</td>
<td></td>
</tr>
<tr>
<td>Dissent</td>
<td>0.18</td>
</tr>
<tr>
<td>Amicus (Appellate)</td>
<td>0.22</td>
</tr>
<tr>
<td>Unpublished</td>
<td>-0.31</td>
</tr>
<tr>
<td>Post-Smith*</td>
<td>-0.27</td>
</tr>
<tr>
<td>Right to Pray*</td>
<td>-0.42</td>
</tr>
<tr>
<td>State Court</td>
<td>0.46</td>
</tr>
<tr>
<td>Federal Court</td>
<td>0.52</td>
</tr>
</tbody>
</table>

Note: Changes in predicted probabilities are derived from the coefficient estimates presented in Table 2. Figure 2 presents changes in predicted probabilities due to changes in independent variables identified as statistically significant in Table 2. Bars depict the change in the predicted probability of a petition or grant corresponding to a change in the specified variables. All independent variables listed here are dichotomous and changes in probability are calculated for unit changes in the variables (i.e., moving from the absence of the variable, 0, to its presence, 1). Predicted probabilities were generated holding all variables except the variable of interest at their median values (0), except for ideological distance, which is held at its mean (0.257). The left portion of the figure presents significant effects from the petition equation. The right portion presents significant effects from the grant equation. Variables are presented in the order in which they are discussed in the text. For the grant equation, variables with significant indirect effects (i.e., those variables that directly significantly affect the likelihood of petitioning) are denoted with a dagger (*) or an asterisk (*). Variables denoted with a dagger are included in the grant equation, but do not have significant coefficients. Variables denoted with an asterisk are not included in the grant equation. Data for this figure are original data collected for the universe of cases of free exercise of religion decided at the U.S. courts of appeals from 1968–2006.
Finally, as well substantiated by past knowledge, certain petitioners appear to have an advantage in certiorari decisions. When either a state government or the federal government is the petitioner, we observe a substantial increase in the probability of certiorari being granted. The increase is 0.46 for state governments and 0.52 for the federal government.

VI. Conclusions

At the level of theory, this article makes important contributions to our understanding of the complex interrelations between agents and their principals. It clarifies a link heretofore missing in our understanding of how the Supreme Court exercises oversight over the hierarchy of the federal judiciary. We argue that the privilege of the Supreme Court of the United States to set its own agenda cannot be modeled as an independent decision; rather, due to the structure of the federal judicial hierarchy, the internal institutions of the Supreme Court, and the role of litigants, how the Court’s plenary docket is populated is contingent on the behavior of petitioners.

At the empirical level, if the decision to grant certiorari is systematically influenced by the choices litigants make, an omission of this fact in the modeling process would result in problematic empirical specifications. The consequences would first be theoretical—failing to specify this conditional relation would exclude a key theoretical element in the federal judicial hierarchy and thus misrepresent the Court’s appellate process as a whole. In addition, at the empirical level, the consequences would involve serious inference problems as the results would be inaccurate due to a selection bias. Specifically, failing to account for the systematic behavior of litigants can lead to biased estimates in the coefficients of predictors of certiorari. Consequently, inferences drawn from the results are potentially inappropriate and the substantive conclusions incorrect.

Admittedly, our data only examine one issue area among many that are adjudicated by the federal judiciary, potentially limiting our ability to generalize our findings to other issue areas and to state court decisions. We, however, did provide and test our hypothesis regarding the conditional nature of the certiorari process using a fairly generalizable model that is able to cross over to additional issue areas with minor modification (e.g., exclusions of issue-specific variables). The main conclusion (i.e., deciding to petition and to grant certiorari are not isolated processes) and the general conclusions of the independent variables (e.g., ideological distance, amicus participation, etc.) hold and are substantively quite similar whether or not we include issue-specific variables. We hope this robustness invites additional empirical investigation and verification of the theoretical and methodological contributions of this article.

Again, we find that both our theoretical and empirical propositions are valid. In other words, failure to account for the systematic and strategic behavior of litigants leads to an incomplete understanding of the Supreme Court’s agenda-setting process and a misspecification of models estimating the effects of various variables on this process. Moreover, when viewing the results through the lens of litigant behavior, we find that the relationship between the justices and litigants is quite nuanced. Certain factors that, at first glance, seem
to have no effect on the choices justices make are actually a function of the choices of litigants. In other words, considerations influencing the decision to decide are in fact conditional on the decision to appeal.

REFERENCES


—— (2007) Answering the Call of the Court: How Justices and Litigants Set the Supreme Court’s Agenda. Univ. of Virginia Press.


Is Certiorari Contingent on Litigant Behavior?


